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In The

Supreme Court of the United States

October Term, 1962

MARYLAND PORT AUTHORITY, BALTIMORE ASSOCIATION OF COMMERCE, DELAWARE RIVER PORT AUTHORITY, THE CITY OF PHILADELPHIA, VIRGINIA STATE PORTS AUTHORITY, AND NORFOLK PORT AND INDUSTRIAL AUTHORITY,
Appellants,

v.

BOSTON AND MAINE RAILROAD, ET AL.,
Appellees.

On Appeal From the United States District Court For the District of Massachusetts

JURISDICTIONAL STATEMENT

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689 and 314 I.C.C. 185, respectively. The order of the Interstate Commerce Commission, dated December 5, 1960, is unreported. The Commission's reports and order have been printed as a separate appendix for the convenience of the Court in this and related appeals and will hereinafter be referred to as App.

JURISDICTION

This action was brought under 28 U.S.C. § 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the District Court enjoining the order of the Commission was entered on February 23, 1962, and these appellants filed their notice of appeal in that court on March 30, 1962. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Virginian Railway v. United States*, 272 U.S. 658; *United States v. Pennsylvania Railroad Company*, 323 U.S. 612.

STATUTES INVOLVED

The statutory provisions involved, the National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001) and Sections 1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2) (49 U.S.C. §§ 1(5), 3(1), 4(1), 15(1), 15(7), and 15a(2)) of the Interstate Commerce Act, as amended, are set forth in Appendix C hereto.

QUESTIONS PRESENTED

This appeal is from a judgment enjoining enforcement of an order entered in an investigation and suspension proceeding under Section 15(7) of the Interstate Commerce Act (49 U.S.C. §15(7)) involving the lawfulness

of proposed rates on export and import traffic to and from New York, Albany, Boston and Portland (the northern tier ports), filed by the appellee railroads for the sole purpose of abolishing the long existing differential in favor of Philadelphia, Baltimore and Hampton Roads (the southern tier ports), and the lawfulness of matching reductions filed by the appellant railroads to and from the southern tier ports for the sole purpose of maintaining the differential, both sides conceding that the issue is one of relationship.

The questions to be decided here are:

1. In such a proceeding does a claim by the carriers proposing the equalizing reductions that their proposed rates were published "in the exercise of their managerial discretion for the purpose of meeting competition of the southern tier ports, and to gain traffic for their lines" outweigh, *as a matter of law*, express findings by the Commission supported by substantial evidence:

(a) that competitive conditions, geographical advantages, and cost of service would all require approval of the matching reductions if the equalizing reductions were approved, with a resulting useless dissipation of carrier revenues to the injury of the national transportation system; and

(b) that if the proposed equalizing rates are permitted to become effective and the matching rates are not, undue preference of the northern tier ports and undue prejudice of the southern tier ports would result, in violation of section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)).

2. In such a proceeding was the Commission entitled to give weight to the distance and cost disadvantages of the northern tier ports?

3. In such a proceeding may the District Court make its own evaluation of the evidence and find that the proposed rates to the northern tier ports have been shown to be just and reasonable, when the Commission made no such finding and there was a finding by the Commission, based on a careful analysis of conflicting testimony, that appellee railroads had not met the burden of proving the proposed rates to be compensatory?

STATEMENT OF THE CASE

The decision of the District Court upsets a rate relationship which has prevailed for 85 years among the railroads carrying export-import traffic between the North Atlantic ports and Differential Territory.* This rate relationship was embodied in the North Atlantic Ports Differential Agreement which was entered into on April 5, 1877 by the presidents of the major railroads serving the Atlantic ports and Differential Territory in an effort to avoid the damaging rate wars which had theretofore marked their competition. (See Ex. 17 (D-4) and Ex. 86 pp. 5 et seq.).

The rate relationship ultimately established by the differential agreement provided, in essence, that the Baltimore rate should be three cents (and the Philadelphia rate two cents) per hundred pounds under that of New York (and that the Boston rates should be not lower than the New York rates) on export-import traffic moving to and from the affected territory. Subsequently carriers serving the ports of Hampton Roads established Baltimore rates to

* Roughly the area bounded by the Mississippi, the Ohio, the Great Lakes and the Buffalo-Pittsburgh line. For a more exact description see 311 I.C.C. 691, App. 4.

and from points in Differential Territory lying west of the so-called "Sandusky" line.*

The present case originated with the publication by appellee carriers** of reduced rates to the northern tier ports for the avowed purpose of abolishing the differential. The proposed rate schedules apply to export and import traffic, except iron ore, coal and coke. The southern railroads filed matching rate reductions for the purpose of maintaining the existing differential. Thus the Commission was presented with the basic question whether it had power to eliminate the differential by compelling the southern railroads to hold their rates to the southern tier ports at the same level as the rates established by the northern railroads to the northern tier ports. That this question of port relationship was the sole issue in the case was expressly conceded at the hearing before the Commission. (311 I.C.C. at 699, 700; App. 15, 16).

The Commission found not only that the existing differentials are proper but that they are "smaller than they

* By voluntary action of the carriers, Portland was given the Baltimore rates on import traffic moving through Canada to Differential Territory, since the Portland carriers were in direct competition with Canadian carriers which were beyond the jurisdiction of the Commission and which served Canadian ports under the Baltimore rates. *Maritime Assoc. Boston Chamber of Commerce v. Ann Arbor R. Co.*, 95 I.C.C. 539 (1925). As a result of litigation, the Commission determined that Albany was entitled to the Philadelphia rates. *Albany Port District Comm. v. Alnapco & W. Ry. Co.*, 219 I.C.C. 151 (1936).

** While all the railroads are, to some degree, participants in all the rates here involved, the appellee railroads, the Erie Lackawanna, the New York Central, the Lehigh Valley, the New Haven, and the Boston and Maine, primarily serve the northern tier ports and will be referred to as the northern railroads. The appellant railroads, the Pennsylvania, the Baltimore & Ohio, the Western Maryland, the Canton, the Chesapeake and Ohio, and the Norfolk and Western, primarily serve the southern tier ports and will be referred to as the southern railroads.

would be if allowed to be set by competitive factors" and that

> "The greater distance of the northern tier ports from the affected territory, and the higher costs of service to and from those ports are firmly established. Thus, approval of respondents' proposed rates would require alternate approval of protestants' proposed rates. This might result in the rates gravitating to their lowest possible level and in a needless dissipation of carrier revenues. We have been given the power to fix rates, among other reasons, for the purpose of preventing destructive competition and promoting the financial stability of the regulated carriers. Failure to observe our obligations in the exercise of that power would find us remiss in our duties. The present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained." (311 I.C.C. at 741; App. 70)

The Commission also found that

> "* * * considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization." (311 I.C.C. at 741; App. 70)

Accordingly, the Commission found that the rates proposed by the northern railroads were

> "* * * not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports, and that the proposed rates would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and disadvantage to the southern tier ports." (311 I.C.C. at 741-742; App. 71)

Furthermore, after analyzing with great care the exhaustive and conflicting cost evidence submitted by the protestant and respondent railroads, the Commission concluded that the revenue from the proposed rates as applied to existing traffic at New York "would equal or exceed by a very small margin the estimated out-of-pocket costs," but that the presentation of costs in the record was not adequate to determine "whether the proposed rates would be reasonably compensatory" or whether "other traffic would be forced to absorb a larger portion of the constant costs in order to maintain a national transportation system conforming to the ultimate objectives of the national transportation policy." (311 I.C.C. at 734; App. 61-62).

The Commission also found that the rates to the southern tier ports proposed by the southern carriers had not been shown to be just and reasonable, but made it clear that a different finding would have been made had the rates to the northern ports not been found to be unlawful. (311 I.C.C. at 700, 741-742; App. 16, 70-71).

The Commission accordingly entered an order on December 5, 1960, directing that all the proposed rate schedules be canceled. An appeal was then taken to the District Court for the District of Massachusetts, and, on behalf of the port interests of the port of Boston and the railroads primarily serving that port, the contention was made that the Commission had erred in failing to treat the proposed rates between Differential Territory and Boston separately and independently. The Department of Justice filed an answer supporting this contention, and the Commission thereupon reopened the proceedings "for reconsideration of the lawfulness of the proposed rates separately and independently on traffic to and from each of the northern tier ports." (314 I.C.C. at 187; App. 87).

On June 15, 1961, the Commission filed its report on reconsideration in which it found that:

> "Boston's rates, as proposed, would be lower than the present rates to and from Albany, and also lower than the present rates to and from New York and Philadelphia. Rates lower to or from Boston than to or from the other ports just mentioned, over some routes, would be in violation of the long-and-short haul provisions of section 4 of the Interstate Commerce Act." (314 I.C.C. at 197; App. 100)

* * * * * *

> "While, in the instant proceeding there is strong insistence by the respondents and the ports supporting them upon rate parity, equally strong are the claims of their opponents, fully substantiated of record, as to the opponents' geographical, transportation and cost advantages. In general, in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration (citing cases). Here, as stated, the distance disadvantages of Boston, for example, are 223 miles over Baltimore, 171 miles over Philadelphia, and 117 miles over New York; and the latter port is 106 miles more distant than Baltimore. Such great differences in distance, under the circumstances here revealed, may not be ignored without running counter to the provisions of section 3(1) of the act." (314 I.C.C. at 198; App. 102)

The Commission then found that

> "* * * the proposed rates to and from Albany, New York, Boston and Portland, separately and collectively, are not shown to be reasonably related to the present rates on like traffic to and from the southern tier ports, and would cause undue preference of and advantage to the named ports and undue prejudice and disadvantage to the southern tier ports." (314 I.C.C. at 199; App. 102-103)

The District Court entered a judgment enjoining the enforcement of so much of the Commission's order of December 5, 1960, as required the cancellation of the "differential-eliminating" rates filed by the northern carriers (*post*, p. 38). This appeal is taken from that judgment.

THE QUESTIONS ARE SUBSTANTIAL

I.

The Case is of Great Public Importance

Over the years the North Atlantic Ports Differential has become the cornerstone of the economy of the Atlantic Seaboard. Mr. Daish, in "The Atlantic Ports Differential" (1918), says at p. ix:

> "The importance of the relation of freight rates which shall prevail as between the North Atlantic ports can hardly be overestimated. The volume of tonnage which moves under these rates, the amount and kind of business which the several ports can and do profitably handle, the tonnage of the carriers to particular ports and many other matters are largely influenced, if not governed, thereby. Historically, the present rate fabric is the oldest in the country; it is the result of many rate wars (now happily ended), compromises, competitions, arbitrations and strifes of carriers and ports."

In reliance upon the differential, the "outports" of Philadelphia, Baltimore and Hampton Roads (and to a lesser degree, Albany and Portland) have developed extensive facilities for the handling of certain types of cargo and have thus been able to compete to some degree with New York for export-import traffic. At the same time New York has become the self-styled "world's greatest port".* Thus the Commission found that in 1955 New York

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* See Exhibit 51, MLM-4

> "* * * handled more tonnage of all commodities than any of the southern tier ports; excluding petroleum, coal, and iron ore, it handled nearly as much as those ports combined; and it handled about 60% more general cargo exports and imports than those ports combined." (311 I.C.C. at 706; App. 23).

With regard to the particular traffic involved in this case, i.e., rail traffic between the North Atlantic ports and Differential Territory, the Commission found that the evidence demonstrated the ability even under the differential of the northern tier ports as a group "to attract the preponderance of the tonnage with the exception of export grain and import ores and concentrates * * *." (311 I.C.C. at 711; App. 31).

There was evidence before the Commission, noted in its original report, that the southern tier ports could not hope under parity rates to compete with New York for general cargo traffic and would in all probability lose their bulk traffic as well. (311 I.C.C. at 736-739; App. 63-68). The Commission expressly found that "considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New York, at least of most types of that traffic, would result from the proposed equalization." (311 I.C.C. at 741; App. 70).

Thus the District Court has in effect determined that New York and the carriers which serve it are entitled as a matter of law to a virtual monopoly of export-import traffic moving between the North Atlantic ports and Differential Territory. Looking at the other side of the coin the District Court has in effect determined that Philadelphia, Baltimore, and Hampton Roads must, as a matter of law, hereafter be relegated to the status of local facilities.

II.

The District Court Has Decided Questions of Great Importance in the Administration of the Interstate Commerce Act in a Manner Inconsistent with the Plain Provisions of the Statute and Has Flagrantly Disregarded Principles of Administrative Finality Established by the Decisions of This Court.

(1) In the Court below the northern carriers claimed that the proposed rates were published "in the exercise of their managerial discretion for the purpose of meeting competition of the southern tier ports and to gain traffic for their lines." They contended that this was not a "port" case but rather a "railroad" case.

This is the approach which the District Court seems to have adopted in its opinion. Thus the Court said:

> "* * * the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition, pursuant to section 15(7) and rates which carriers, on complaint under section 3(1) may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competition — [Citations] — in which case the issue to be decided is whether the *proposed* rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a 'port' case, not a 'railroad' case. For example, the observation that 'in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration,' [Citation to 314 I.C.C. at 198; App. 102], while perhaps true, was totally irrelevant to the issues before it". (*post*, pp. 35-36).

Again the Court says (*post*, p. 36):

> "While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, *the primary issue is whether equalization is necessary to enable the plaintiff railroads to compete.*" (Emphasis supplied.)

Again the Court says (*post*, pp. 33-34):

> "[the Commission] considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings."
>
> * * * * * *
>
> "We find that the Commission erred in applying section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities."

(a) The District Court has completely misunderstood the real nature of this case. Here all parties before the Commission had agreed that the issue was essentially one of relationship. The carriers proposing the rates to the northern ports had made it clear that their sole purpose was to abolish the differential and establish a new relationship of parity between the ports. (311 I.C.C. at 699; App. 15). The carriers proposing the matching reductions to the southern ports had expressly requested that the Commission decide the issue of relationship on the present level of rates. (311 I.C.C. at 700; App. 16).

The Commission specifically found, on the basis of a most exhaustive study of a most comprehensive record, that competitive considerations, geographical advantages, and cost of service all required that if the rates proposed to the northern ports became effective, the matching reductions to the southern ports should likewise be approved. To prevent destructive competition and a pointless waste of carrier revenues to the injury of the national trans-

portation system, the Commission ordered cancellation of all the proposed rates.

The District Court treated the case as though no question of relationship were involved and held that the Commission lacked the power to prevent the rates to the northern tier ports from becoming effective, since the court, after making its own evaluation of the evidence, found that those rates were within the zone of reasonableness and had been proposed by the northern carriers in order that they might more effectively compete for bulk traffic to Differential Territory. The District Court ignored altogether the findings which, in the opinion of the Commission, demonstrated that the matching reductions of the southern railroads to the southern tier ports would likewise have to be approved as being within the lawful range of competition if the rates proposed by the northern railroads to the northern tier ports were permitted to become effective.

This one-sided approach of the District Court would inevitably lead to rate wars. According to the District Court, all that a carrier would need to show in order to justify a lower rate would be that the rate would return out-of-pocket costs and that it would aid the carrier in attracting traffic from competing carriers. But it is obvious that in many cases, competing carriers could make an equally strong showing and here the Commission has expressly found that this is such a case. If, as the District Court seems to think, the Commission lacks power in such a case to interfere with the managerial discretion of the carrier, then obviously the lowest cost carrer would win the battle, but only after a useless dissipation of carrier revenues. As the Commission points out, it was given the power to regulate rates for the very purpose of stopping such wasteful conflicts.

(b) The District Court has apparently failed to note that Section 15(7) explicitly authorizes the Commission to "make such order with reference [to a proposed rate] as would be proper in a proceeding initiated after it had become effective." This language has always been understood to mean that the Commission may properly order cancellation of rates which fail to meet the test of any of the statutory provisions. Thus rates which unduly prejudice or disadvantage any port and would thus violate Section 3(1) of the statute may be ordered cancelled in an investigation and suspension proceeding under Section 15(7). *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 581-583; *Sioux City Terminal Ry. Switching*, 241 I.C.C. 53, 73-74 (1940).

In a closely analogous situation, this Court has definitely invalidated the approach to this case adopted by the District Court. In *Iron Ore From Eastern Ports to Central Freight Association Points*, 299 I.C.C. 195 (1956), the Commission, reversing a previous decision of Division 2, approved rate reductions establishing parity rates on iron ore to seven points in differential territory from New York, while at the same time disapproving matching rate reductions filed by carriers serving the port of Baltimore. On appeal the Maryland District Court enjoined the order. *Baltimore & Ohio Railroad Co. v. United States*, 151 F. Supp. 258 (1957). On direct appeal this Court sent the case back to the District Court with instructions to remand the case to the Commission for further consideration. This Court held that "the Commission should be permitted to take into account the effect of New York rates and the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commis-

sion may find to be required by their inter-relationship." *I.C.C. v. Baltimore and O. R. Co.*, 355 U.S. 175, 178. In the light of this decision the District Court was clearly in error in the present case in holding that this was a "railroad" and not a "port" case.

(c) It may be argued that the District Court's intention was to require the Commission to abolish the differential by permitting the northern carriers to lower thier rates and forbidding the southern carriers to do so. Nowhere in its opinion does the Court actually say this and its whole approach seems inconsistent with such a result. But if that is the correct interpretation of the Court's opinion and judgment, then it is even more clearly erroneous. The Commission plainly had no power to prohibit the southern carriers from maintaining a differential relationship unless that relationship was unlawful and the Court obviously lacked the power to order the Commission to do so. In the present case the Commission has expressly found that "the present differentials have long served to retain a reasonable competitive relationship between the principal port groups and should be maintained."* (311 I.C.C. at 741; App. 70). This finding should have been conclusive of this case in the District Court. In *Ayrshire*

* For 85 years the lawfulness of the existing differential relationship has been upheld against every attack. Every argument made in the Court below has been repeatedly considered and reviewed by the Commission. The argument principally relied on here, i.e., that the differential should be eliminated since it was intended to equalize a difference in ocean rates which no longer exists, was first made and rejected by the Commission in 1898 in *New York Produce Exchange v. Baltimore & O. R. Co.*, 7 I.C.C. 612 and again rejected in 1905, with the Commission expressly finding at that time that the differential was greater than any inequality in ocean rates. *In the Matter of Differential Rates*, 11 I.C.C. 13 (at p. 67). It was reviewed and was again rejected in *Maritime Asso., Boston Chamber of Commerce v. Ann Arbor Railroad Company, et al.* 95 I.C.C. 539 (1925).

Collieries Corp. v. United States, 335 U.S. 573, 592, this Court said:

> "We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informal judgment on a multitude of facts."

(d) The District Court's assertion that the Commission should have given primary weight to whether "equalization is necessary to enable the plaintiff railroads to compete" (*post*, p. 36), as well as its complaint that the Commission "discounted" that need and failed to give "due weight to the interests of shippers, receivers, carriers, and inland localities" (*post*, p. 34), shows on its face a complete disregard for principles of administrative finality repeatedly proclaimed by this Court.

In *Texas and Pacific Railway Company v. I.C.C.*, 162 U.S. 197, 219, this Court said:

> "* * * as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact."

Again, in *Board of Trade v. U.S.*, 314 U.S. 534, 546-548, this Court said:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission * * *, and upon which its decisions, made the basis of administrative orders operating in futuro, are not

> to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.' *Manufacturers R. Co. v. U.S.*, 246 U.S. 457, 481, * * *"

In this case, the Commission expressly found that Baltimore and Hampton Roads were much more dependent upon the traffic to and from differential territory than were the northern tier ports and that they had "far less support in the hinterlands which they serve." (311 I.C.C. at 735; App. 62-63). The Commission also found that even under the differential, New York was handling all or substantially all of a great range of products. (311 I.C.C. at 735-736; App. 63). The Commission further found that the southern tier ports were largely dependent upon bulk movements, much of which might well be lost to the St. Lawrence Seaway. (311 I.C.C. at 737; App. 64). There was extensive testimony of which the Commission took note that under parity the southern tier ports could not compete for general cargo and would probably lose to the northern tier ports a large part of the bulk traffic not already diverted to the Seaway. (311 I.C.C. at 736-739; App. 63-68).

Accordingly, the Commission found that

> "* * * the record is clear that New York continues to attract more of the highly desirable general-cargo tonnage so vital to its port economy than all of the other North Atlantic ports combined; that to obtain a volume of traffic which will support a much lower level of port activity and range of shipping services than New York, the southern tier ports have been depending heavily on bulk cargo tonnage; and that, considering the volume and character of the traffic disclosed by the traffic study, and other evidence of circumstances which induce or deter the flow of the subject traffic, undue diversion from those ports to New

> York, at least of most types of that traffic, would result from the proposed equalization." (311 I.C.C. at 741; App. 70).

Thus the Commission's ultimate conclusion that the proposed rates to the northern tier ports would unduly prejudice and disadvantage the southern tier ports was based on adequate subsidiary findings, supported by substantial evidence and cannot be challenged in this proceeding.

(2) The District Court refers to "the weight the Commission attached to the sole subsidiary finding upon which this conclusion is based — that the northern tier ports have a distance disadvantage over Baltimore of from 223 miles in the case of Boston to 117 miles in the case of New York." (*post*, p. 29). The Court holds that

> "Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it.". (*post*, p. 36).

Apparently the District Court overlooked the extensive subsidiary findings unrelated to distance which were set forth in the Commission's original report and on which the Commission based its ultimate conclusion.* These findings were expressly reaffirmed in the report on reconsideration. (314 I.C.C. at 199; App. 103).

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* See for example the extended analysis of the traffic moving through the various ports and the effect of the differential on that traffic and the detailed description of the services and facilities available at each port. (311 I.C.C. 701-730, 735-739; App. 17-56, 62-68).

Moreover, in the original report of the Commission there is a full review of extensive evidence bearing on the cost and value of the services of the railroads, and the Commission explicitly found that "the greater distance of the northern tier ports from the affected territory, *and the higher cost of service to and from those ports*, are firmly established." (311 I.C.C at 741; App. 70) (emphasis added.) Again, in the report on reconsideration, the Commission expressly found that the claims of the opponents of rate parity as to their "geographical, transportation, and cost advantages" were "fully substantiated of record." (314 I.C.C. at 198; App. 102).

The other reasons given by the District Court for holding that the Commission should have given no weight to the distance factor are equally specious. It is said that no consideration whatever was given to disparity in rail distance when the differential was originally established or later. (*post*, p. 34). This is flagrantly inaccurate as a matter of historical fact.* It is also irrelevant since circumstances alter cases and here the Commission specifically referred to "the circumstances revealed by this record."

Next it is said that:

> "* * * one of the purposes of the 1935 amendment to Section 3 was * * * to permit all ports and the carriers

* The Court refers to the report of the Thurman-Cooley, Washburn Advisory Commission in 1882. This report was offered as an exhibit before the Commission and may be found reprinted in full in Ex. 1 (REB 1). The conclusion of that report, at p. 31, contains the following sentence:

"Differential rates have come into existence under the operation of competitive forces; *they bear some relation to relative distance and relative cost of service; they recognize as we think the relative advantages of the several seaports;* and they are subordinate to the great principle which compels the carriers of property competing between the same points and offering equal facilities to their customers, to make the same rates." (Emphasis supplied.)

serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand if applied only in this case, the decision is arbitrary and capricious." (*post*, p. 35).

There is, of course, no principle that all ports and the carriers serving them are entitled to compete on equal terms for all export and import traffic to every inland point. Baltimore carriers are not entitled to compete on parity rates with New York carriers for traffic to the Hudson River Valley, nor are they entitled to compete on equal terms with the Philadelphia carriers for the traffic to Wilkes-Barre. The argument that no weight should be given to distance because otherwise traffic would flow only through the most distance favored ports assumes that if any weight is given to distance, it must in every case be dispositive. This hardly seems to require discussion.

Equally faulty is the District Court's reasoning that in cases where carriers voluntarily publish rates to meet competition pursuant to Section 15(7) distance differences are irrelevant. The Court overlooks the fact that they are not dealing in the present case with *voluntary* action of carriers but with an effort of some to *impose* parity on others. If the voluntary action of carriers alone was involved here, then the Commission would have to give equal sanction to the voluntary action of the southern railroads in reducing their rates to the southern ports.

The passage quoted above (at p. 16) from the opinion of Mr. Justice Douglas in *Ayrshire Collieries* fits like a glove. The Court has clearly exceeded the proper bounds of judicial review.

(3) The District Court, adopting the view of dissenting Commissioner Webb, made its own finding that the proposed rates to the northern ports had been shown to be just and reasonable. (*post*, p. 32). The Commission made no such finding. On the contrary, the Commission found that the cost evidence in the record was not adequate to permit a finding that the rates would be compensatory. (311 I.C.C. 734; App. 61). In reaching its conclusion the District Court relied on cost studies which the Commission had found to be incomplete and on testimony, which the Commission had not found to be persuasive, to the effect that revenues from the proposed rates would be substantially in excess of "the average revenues per ton-mile for Class I railroads in the United States." (*post*, p. 32). This reliance of the Court on testimony as to comparative revenues was naive in the extreme. Revenues which may be exceeded by the cost of service can have little significance in a case of this character.

Appellants submit that in making its own determination that the rates had been shown to be just and reasonable the District Court far exceeded the proper bounds of judicial review as delimited by the decisions of this Court. In *Illinois Commerce Commission v. United States*, 292 U.S. 474 at p. 481, this Court said:

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission."

Moreover, the power of the Commission to find rates unreasonably low even though fully compensatory has been well settled by this Court. For example, in *New York v. United States*, 331 U.S. 284, the following appears:

"In *Scandrett v. United States*, 32 F. Supp. 995, 996, aff'd. 312 U.S. 661, the Commission had found that proposed reduced rates were 'compensatory, considering all costs' but that they were below a minimum reasonable level and therefore unlawful." * * *. "The court sustained the order." (pp. 345-346).

In the same opinion, at page 346, this Court said:

"If the Commission were powerless to increase rates to a reasonable minimum in order to eliminate an unlawful discrimination, unless existing rates were shown to be non-compensatory or unless ruinous competition would result, it would in some cases be powerless to prescribe the remedy for unlawful practices."

A fortiori may the Commission refuse to permit existing rates to be reduced where the proposed reduced rates, irrespective of their compensativeness, would cause undue preference or prejudice, and particularly where the statutory burden of proving the rates lawful under all sections of the Interstate Commerce Act is upon the proponent carriers.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is therefore respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

United States District Court
District of Massachusetts

Civil Action No. 61-38-S

Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Before WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

OPINION OF THE COURT

February 16, 1962

SWEENEY, CH. J.: The plaintiffs — Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company — brought this action pursuant to 28 U.S.C. §§ 1336, 2284, 2321 and 2325, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission, Investigation and Suspension Docket No. 6615, Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689, denying a fourth-section application and cancelling new rate schedules filed by the plaintiffs and their connecting carriers,[1] in which they proposed to reduce rates

[1] The Delaware and Hudson Railroad Corporation, Erie-Lackawanna Railroad Company, Grand Trunk Railway System-Lines East, The New York Central Railroad Company, New York, Susquehanna and Western Railroad Company.

on export and import traffic[2] between the ports of New York and Albany, New York, Boston, Massachusetts, and Portland, Maine, hereinafter referred to as northern tier ports, on one hand, and affected territory[3] on the other. The proposal was designed to place on a parity the rates on this traffic through these ports with rates on like traffic through the southern tier ports.

The original defendants are the United States and the I.C.C. Other railroads and various port and commercial interests have intervened on both sides.[4]

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[2] Except iron ore, coal, and coke which is a direct product of coal.

[3] It includes territory on and west of a line extending from a point just west of Buffalo through Warren, Oil City, Butler, Pittsburgh, and Washington, Pa., Wheeling, W. Va., thence along the east bank of the Ohio River to Kenova, W. Va., including points in West Virginia, Charleston and west thereof, certain points in Kentucky on the lines of The Chesapeake and Ohio Railway Company, and points on the south bank of the Ohio River from Huntington, W. Va., to Cincinnati, Ohio.

[4] The intervening plaintiffs include the Massachusetts Port Authority; the Port of New York Authority; the State of New York; the City of New York; Brooklyn Chamber of Commerce, Inc.; Belleville Manufacturers' Association; Bergen County Chamber of Commerce; Bronx Board of Trade; Chamber of Commerce, Garfield, N. J.; Chamber of Commerce, Irvington, N. J.; Chamber of Commerce of Eastern Union County; Clifton Chamber of Commerce; Commerce and Industry Association of New York, Inc.; Hoboken Chamber of Commerce; Ironbound Manufacturers' Association, Inc.; The Maritime Association of the Port of New York; Newark Association of Commerce and Industry; New Jersey Industrial Traffic League, Inc.; Queensborough Chamber of Commerce; The Shippers Conference of Greater New York; The West New York Chamber of Commerce; West Side Association of Commerce in the City of New York; and the railroads listed in paragraph one.

The intervening defendants include the Baltimore and Ohio Railroad Company; Canton Railroad Company; The Chesapeake and Ohio Railway Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; Western Maryland Railway Company; the Delaware River Port Authority; the Virginia State Ports Authority; Norfolk Port and Industrial Authority; City of Philadelphia; Maryland Port Authority; Baltimore Association of Commerce; and the Maine Central Railroad Company.

The differences in existing rail rates on import and export traffic are shown below.

Port	*Differentials, in cents per 100 pounds*					
	Classes					
	1	*2*	*3*	*4*	*5*	*6*
Import traffic						
Canadian ports (same as Baltimore)						
Portland (Baltimore rates via Canadian routes; New York rates via standard routes)						
Boston (same as New York)						
Albany (Philadelphia rates, subject to domestic rates as maxima)						
Philadelphia under New York	6	6	2	2	2	2
Baltimore under New York	8	8	3	3	3	3
Hampton Roads[1] (same as Baltimore)						
Export traffic						
Canadian ports:						
Halifax, St. John, et cetera (same as New York)						
Montreal (same as Philadelphia)						
Portland						
Boston (same as New York)						
Albany (Philadelphia rates, subject to domestic rates as maxima)						
Philadelphia under New York:						
Grain, 0.5 cent under N.Y. / Flour, 1 cent under N.Y.	2	2	2	2	2	2
Baltimore under New York:						
Grain, 1.5 cents under N.Y. / Flour, 2 cents under N.Y.	3	3	3	3	3	3
Hampton Roads[2] (same as Baltimore)						

[1] To territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

[2] From territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

The differentials were the result of an agreement entered into by North Atlantic port railroads in 1877. At that time ocean rates to Philadelphia and Baltimore were higher than to the northern tier ports and the object of the agreement was "to avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia, and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through these cities." Boston rates, under this agreement, were to be no less than those to and from New York.

Beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports consequently became higher than the combined cost of rail and ocean transportation through a southern tier port. It is this competitive disadvantage which the plaintiff railroads sought to remove with their proposed rate schedule.

By schedules filed to become effective simultaneously with those of plaintiffs, certain railroads which serve the southern tier ports and, in some instances, also New York, proposed to reduce their rates by the same amounts. This counterproposal, which was to take effect only if the plaintiffs' schedules were allowed, would restore the differential at a lower level.

Upon protests of each group to the other proposal, the I.C.C. suspended both schedules and instituted an investigation into their lawfulness. After hearing and review by the Commission, it issued the order from which this appeal was taken, denying the fourth-section application and cancelling the plaintiffs' proposed schedule on the findings that the "proposed rates are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports"; that they "would result in undue preference of and advantage to the northern tier ports as a group and in undue preju-

dice and disadvantage to the southern tier ports," and that they "are not shown to be just and reasonable." Equalization of Rates, *supra*, at 741, 742.

In its answer to the complaint in this action the United States admitted that the Commission's order was erroneous in that it treated the proposal vis-a-vis the northern tier ports as a group and failed to consider the lawfulness of the proposed rates as to each port separately. As a result, the Commission reopened the proceedings "for reconsideration on the present record of the lawfulness of the proposed rates separately and independently on traffic to and from each northern tier port." The proceedings in this court were held in abeyance pending this decision.

On reconsideration the Commission affirmed its original holding and also found that the greater distance of the northern tier ports from affected territory over Baltimore and Philadelphia "may not be ignored without running counter to the provisions of section 3(1) of the Act," p. 21, Recon.[1] Moreover, it found "so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports, and that, so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of these ports," p. 21, Recon.

The Commission's decision is attacked here generally as being erroneous in law, unsupported by essential basic findings and unsupported by substantial evidence on the record as a whole.

The specific object of attack by the plaintiffs in this proceeding is the Commission's conclusion of a section 3(1) violation, and the weight the Commission attached to the sole subsidiary finding upon which this conclusion is based — that the northern tier ports have a distance disadvantage over Baltimore of from 223 miles in the case of Boston to 117 miles in the case of New York.

[1] Page references so designated are to the mimeographed copy of the Report of the Commission on Reconsideration.

It is admitted by the plaintiffs that the function of a court reviewing an administrative decision is a limited one. The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U.S. 282, 286-7 (1934), and specifically "the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power or (3) based upon a mistake in law." *I.C.C. v. Union Pacific R.R.*, 222 U.S. 541, 547 (1911). Further, an order cannot be sustained unless supported by essential basic facts particularly stated. *Atchison, T. & S. F. Ry., v. United States*, 295 U.S. 193 (1935); *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499 (1935).

Under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof to show that the proposed rates are "just and reasonable" within the meaning of section 1(5), free from unjust discrimination prohibited by section 2 and that they contain no undue preference or prejudice proscribed by section 3(1).

The evidence before the Commission showed and the Commission found that the four northern tier ports experienced a relative decline in the participation of *total* United States foreign tonnage in the period 1923-55, while the relative share of the southern tier ports increased markedly during the same period. Thus, even while the foreign traffic through New York during this period rose from 22.6 million gross tons to 36.2 million gross tons, its share of the total United States tonnage declined from 28.6 per cent to 14 per cent. Boston's participation dropped similarly from 4.7 per cent to 2.5 per cent. On the other hand the share of the southern tier ports of total United States imports and exports increased as follows: Philadelphia from 7.9 to 15.7 per cent, Baltimore from 8.4 to 10.4 per cent and Hampton Roads from 4.3 to 17.1 per cent.

Since these figures are not limited to affected territory traffic, nor even to rail tonnage, they are by no means conclusive proof of the plaintiffs' position; but they do

serve as an indication of the trend in import-export traffic movement. In order to present a clearer and more complete picture of comparative traffic between all North Atlantic ports and affected territory the railroads conducted traffic studies during 1955-56 which showed that 75.8 per cent of imports and 63.7 per cent of exports (measured by carloads) moved through the southern tier ports. Similar, but incomplete studies for the years 1946 and 1947 tentatively indicate that a downward trend of import-export traffic to affected territory on the lines serving New York exists.

The Commission points out that New York still clearly dominates general cargo traffic and that the preponderance of southern tier traffic consists of bulk cargo[1] which prefers these ports because of their modern, specialized facilities and services. It is also apparent, however, that bulk cargo is necessarily more sensitive to rate differentials and the Commission implicitly so acknowledges by noting that the equalization of ex-lake rates on grain from Buffalo has resulted in a shift of the relative shares of that traffic in favor of the northern tier ports. Moreover, New York's dominance in general cargo traffic is not sufficient reason for denying it and the railroads serving it the opportunity to compete for bulk cargo traffic, as "both types of cargo are considered essential to a healthy port economy." Equalization of Rates, *supra*, at 701.

There was, furthermore, extensive evidence from shippers, both private and representatives of various agencies of the United States, that the differential adjustment is a controlling consideration in their choice of ports. These

[1] "Ocean borne commerce is classified into two types of cargo. By far the largest in volume is bulk cargo. It consists generally of low-value heavy volume raw materials which are handled at the port by mechanical facilities and provide bottom loading for ships or may move as full cargoes. The other type, called general cargo, includes principally manufactured and semimanufactured goods of relatively high value, which are usually packaged. General cargo generally constitutes the more profitable 'top loading' for ships in a balanced cargo operation." Equalization of Rates, *supra*, at 700.

witnesses supported equalization and testified to the need to provide relief from congested ports, bunching and inefficient utilization of cars and delays in the flow of traffic.

In addition to this evidence indicating the importance of the differential and showing the necessity for its removal, the plaintiffs presented proof that the proposed rates are just and reasonable. In view of the minimal amounts of the proposed reductions (reduction in revenue from Chicago to Boston would be .08 cents per ton-mile on first-class traffic and .10 cents on Column 13 traffic, for example), the plaintiffs relied on a prima facie showing of revenues. There was testimony that, using representative origins and destinations and the proposed rates, for 96.8 per cent of all tonnage moving through the port of New York, the import traffic averaged a rate per ton of $19.20 and revenues per ton-mile of 2.47 cents, and that for export traffic these figures were $18.00 and 2.32 cents. In comparison the average revenue per ton-mile for Class I railroads in the United States is 1.384 cents.

The defendant railroads countered this evidence by showing that with respect to traffic through the port of New York the proposed rates were insufficient to return out-of-pocket costs. But, while it refused to find the rates compensatory, the Commission did find after restating and adjusting the cost evidence, that "the revenue from the proposed rates would equal or exceed by a very small margin the estimated out-of-pocket costs." Equalization of Rates, *supra*, at 735.

On this evidence the plaintiffs certainly established prima facie that the proposed rate schedule is just and reasonable. We now turn to the Commission's disposition of the case. As noted above, it disallowed the proposal principally on the ground that the rates would violate section 3(1). This section provides that

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advan-

> tage to any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

In one of the earliest cases to come before the Supreme Court under this Act, the Court said that when presented with a question of unjust discrimination, the Commission is to "take into consideration all the facts of the given case — among which are to be considered the welfare and advantage of the common carrier and of the great body of the citizens of the United States. . . . The Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it." *Texas & Pac. Ry. v. I.C.C.*, 162 U.S. 197, 218 (1896). In 1940, Congress, by adding the National Transportation Policy, 49 U.S.C., affirmed and reiterated the view that the Act must be interpreted as a whole and the competing interests of shippers, carriers, and localities carefully balanced "to the end of developing a national transportation system. . . ."

While apparently recognizing these principles, the Commission, in this case, nonetheless wholly ignored them. It noted the voluminous testimony of shippers and receivers in favor of equalization, but in its conclusions completely disregarded this evidence. It considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings. Its final decision rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates.

In emphasizing the welfare of ports and port districts, the Commission apparently relied on the 1935 amendment

to section 3(1) which added "ports, port districts, gateways and transit points," to the interests protected by that section.

In *Texas & Pac. Ry. v. United States*, 289 U.S. 627 (1933), the Supreme Court had held that the word "locality" referred to "points of origin or destination" and did not include gateways. The purpose of the amendment was only to restore to the Commission a power which it had previously exercised, but which the Supreme Court had held the Commission did not have. Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended.

We find that the Commission erred in applying section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities.

The Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single subsidiary finding — the distance disadvantage of the northern tier ports. In the light of the history of the differential, earlier decisions of the Commission concerning it, the original report issued in this case, and the facts of this case, this finding in the Report on Reconsideration and its import are somewhat difficult to understand and, in view of the applicable law, erroneous. In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to dispartity in rail distances then or later. On the contrary, when the Thurman-Cooley-Washburn Advisory Commission concluded in 1882 that the differentials should remain, it specifically rejected the "distance principle" as controlling port relationships and rested its award on the principle of "competitive opportu..ity."

Until it filed its Report on Reconsideration in this proceeding, the Commission itself has continually adhered

to the proposition that distance plays no part in the determination of port differentials. It so stated even in its original report: "Such distance disadvantages as they (the northern tier ports) have are much less than the substantial differences to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several South Atlantic and Gulf ports are equalized. . . . It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." Equalization of Rates, *supra*, at 715, 716.

Even while proclaiming this new rule, the Commission ignores it. Import rates from Portland may remain on a parity with Baltimore in spite of a distance disadvantage of more than 300 miles. Moreover, the present differentials do not in any way reflect the distance differences.

Secondly, one of the purposes of the 1935 amendment to section 3 was, as the Commission had previously pointed out, Equalization of Rates, *supra*, at 716 and cites therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious.

Thirdly, the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1), may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competion — *United States v. Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935); *Texas & Pac. Ry v. United States*, 289 U.S. 627, 636 (1933); *New York Cent. R.R. v. United States*, 99 F. Supp. 394 (D.C. Mass. 1951) — in which case the issue to be decided is whether the *pro-*

posed rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a "port" case, not a "railroad" case. For example, the observation that "in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration," p. 21, Recon., while perhaps true, was totally irrelevant to the issues before it. Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States v. Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it.

The Commission disapproved the plaintiff's proposal on the additional ground that, insofar as New York is concerned, equalization is not necessary to enable that port to compete. This conclusion again is based on a misunderstanding of the nature of the proceedings. While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, the primary issue is whether equalization is necessary to enable the plaintiff railroads to complete. And the evidence showed that the share of traffic handled by these railroads has been declining.

The last reason given in support of its decision is that with respect to the ports of Boston, Albany and Portland, "equalization would not materially affect the flow of traffic to these ports." Not only does this statement completely contradict the Commission's ultimate conclusion of undue prejudice to the southern tier ports, but it ignores the plaintiffs' right to attempt to gain some of this traffic for their lines.

We, therefore, conclude that the Commission's decision is erroneous in law and lacks the rational basis necessary

to uphold it and it must be set aside. A judgment may be entered setting aside the order of the I.C.C. and issuing a permanent injunction as prayed for.

s/ PETER WOODBURY,
Chief Judge,
United States Court of Appeals.

s/ GEORGE C. SWEENEY,
Chief Judge,
United States District Court.

s/ FRANCIS J. W. FORD,
United States District Judge.

APPENDIX B

United States District Court
District of Massachusetts

Civil Action No. 61-38-S

Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company,
Plaintiffs,

v.

United States of America and Interstate Commerce Commission,
Defendants.

Before WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

JUDGMENT

In accordance with the opinion of the Court handed down on February 16, 1962, it is hereby ORDERED

The order of the Interstate Commerce Commission of December 5, 1960, insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective, is set aside and the operation, enforcement and execution thereof is permanently enjoined.

By the Court,

s HELEN I. TWEEDY,
Deputy Clerk.

Approved:

s PETER WOODBURY

s GEORGE C. SWEENEY

s FRANCIS J. W. FORD

Judgment entered February 23, 1962.

JOHN A. CANAVAN,
Clerk,

By s HELEN I. TWEEDY,
Deputy Clerk,

APPENDIX C

The National Transportation Policy (Preamble to 49 U.S.C. 1) and the Interstate Commerce Act, 24 Stat. 379, as amended (49 U.S.C. 1 *et seq.*), provide as follows:

National Transportation Policy

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * * * * *

"Sec. 1 * * * (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

* * * * * * *

"Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

* * * * * * *

"Sec. 4(1). It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this chapter or chapter 12 of this title, but this shall not be construed as authorizing any common carrier within the terms of this chapter or chapter 12 of this title to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent, to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge

to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *Provided further*, That any such carrier or carriers operating over a circuitous line or route may, subject only to the standards of lawfulness set forth in other provisions of this chapter or chapter 12 of this title and without further authorization, meet the charges of such carrier or carriers of the same type operating over a more direct line or route, to or from the competitive points, provided that rates so established over circuitous routes shall not be evidence on the issue of the compensatory character of rates involved in other proceedings: *And provided further*, That tariffs proposing rates subject to the provision of this paragraph requiring Commission authorization may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

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"Sec. 15 (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual

or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

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"Sec. 15 * * * (7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice

goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

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"Sec. 15a. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."